89-1037

No. _____

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

XEMAS, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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36 pp

QUESTIONS PRESENTED

Whether the Internal Revenue Service, in availing itself of state procedures to undue or ignore allegedly fraudulent transfers, is limited in its use of these remedies by the state statute of limitations.

Whether the Internal Revenue Service may sell real estate titled and held by a corporation not identical in personnel, assets, or structure to the original taxpayer without order from state or federal court.

Whether a direct federal cause of action exists allowing the Internal Revenue Service to seize property without the use of jeopardy assessment procedures under 26 U.S.C.A. § 6861, or transferee liability avoidance under 26 U.S.C.A. § § 6901, 6902, or color of state law.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Xemas, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on September 20, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is unreported and is reprinted in (App. A, p. 1a). The prior opinion of the United States District Court (App. B, p. 4a) for the District of Minnesota, also reprinted in the appendix, is reported as follows: 689 F. Supp. 917 CD. Minn. (1988). The United States Court of Appeals, September 20, 1989 order denying rehearing and rejecting the suggestion of rehearing en banc (App. C, p. 6a) is unreported.

JURISDICTION

The opinion of the Court of Appeals was entered July 24, 1989.

Xemas, Inc.'s petition for rehearing was denied on September 20, 1989. The court's jurisdiction is invoked under 28 U.S.C.A. § 1254(1). Jurisdiction of the District Court was invoked under 26 U.S.C. §§ 6212, 7421, 7426; the Federal Tort Claims Act, and The Fifth Amd. to the U.S. Const. Jurisdiction of the Court of Appeals was invoked under 28 U.S.C.A. § 1292(a)(1).

STATUTORY PROVISIONS INVOLVED

Appendix D sets out the relevant portions of the Minnesota fraudulent transfer statutes.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case arises from a lawsuit brought under 26 U.S.C.A. § 7426 to recover property seized on account of the debts of a third party. Also central to this case are the transferee liability provisions of the Internal Revenue Code, 26 U.S.C.A. § 6901 et seq. and the Minnesota laws and procedures relating to fraudulent conveyances, particularly Minn. Stat. § 513.26 and Minn. Stat. § 513.28.

STATEMENT OF THE CASE

26 U.S.C.A. § 7426 allows a plaintiff to recover the property, or the value of property, seized by the Internal Revenue Service to satisfy the debt of another. The instant lawsuit involves an attempt by Xemas, Inc. to recover a home and lot, or its value, previously owned by taxpayers Roman and Imelda Spaeth.

XEMAS, INC.

Xemas, Inc. is a Minnesota corporation. It was formed in 1984, when its Articles of Incorporation were filed with the Secretary of State of the State of Minnesota. Xemas, Inc.'s primary business was to purchase real estate, and to collect the rents from that real estate or to resell real estate at a profit. Xemas, Inc.'s first president was Daniel Strohmeier. Prior to the commencement of this lawsuit, Robert Hagstrom became President of Xemas, Inc.

Xemas, Inc. owned various properties in central Minnesota including a contract for deed on property owned by the Odenwald's. It also purchased a house and lot which are the subject of this action from BBCA, Inc., a Minnesota corporation. On January 7, 1987, the Internal Revenue Service sold the property acquired from BBCA, Inc. to satisfy certain tax debts of Roman and Imelda Spaeth. The proceeds from the sale were applied to partially satisfy the tax lien of Roman and Imelda Spaeth.

THE PROPERTY SEIZED AND SOLD

Prior to 1978, Roman and Imelda Spaeth, husband and wife, had owned certain property in Stearns County, Minnesota, described as follows, to-wit:

> The South Seventy-two (72) feet of Lots Four (4), Five (5), and Six (6), Block Three (3), of Ahmann's Addition to the Village of Richmond, according to the plat and survey thereof on file and of record in the Office of the Register of Deeds, within and for Stearns County, Minnesota

On December 28, 1978, the Spaeths transferred their property by gift to Joan M. Noske, Trustee of the Basic Bible Church of America, Chapter 7024. On December 30, 1980, Joan M. Noske, Trustee, sold the property to BBCA, Inc., a Minnesota nonprofit corporation. On November 28, 1984, BBCA, Inc. sold this property by warranty deed to Xemas, Inc. at its fair market value of $47,000. At the time of the Spaeth-to-Noske transfer, no tax liability had been assessed against the Spaeths. The first federal tax assessment against the Spaeths, which involved tax year 1978, was dated July 14, 1980. The first federal tax lien, for $3,380.39 was filed against the Spaeths on August 31, 1981. On September 18, 1984, a lien was filed against BBCA, Inc. as the nominee of Roman and Imelda Spaeth. On July 8, 1986, notices of seizure were sent to Xemas, Inc. and BBCA, Inc. as nominees of Roman and Imelda Spaeth. On January 7, 1987, the Internal Revenue Service sold the above described property. The liens were released on September 23, 1987. The Internal Revenue Service had not brought action in either state or federal court to undo any of these transactions prior to its sale.

REASONS FOR GRANTING THE PETITION

The Circuit Court for the Eighth Circuit has decided the question of the Internal Revenue Service to utilize state collection remedies without the restriction of state statutes of limitations in the case of *United States v. Wurdemann,* 663 F2d 50 (8th Cir. 1981) and approved in this case the reasoning of the lower court which applied *Wurdemann* to these facts. *Wurdemann* is in conflict with subsequent Supreme Court decisions, including *Wilson v. Garcia,* 471 U.S. 261 (1984) and *DelCostillo v. Teamsters,* 462 U.S. 151 (1983). There is no doubt that state rules of property must be applied and enforced in proceedings under revenue statutes in the absence of a conflicting federal law. *Howard v. United States,* 125 F2d 986 (C.C.A. 5th. 1942). And if there is one principle of law that is perfectly clear, it is that in the absence of provisions of federal statutes expressly regulating the matter, the statutes of the several states with regard to the limitation of actions is controlling on federal court in actions at law instituted in those courts, and federal courts follow the construction given by the highest court of the state to such a statute. *Pond v. United States,* 111 F. 989, 996. (C.C.A. 9th. 1901).

Of course, *Wurdemann* contends that the federal tax lien is a form of federal statute of limitations, and therefore state statutes do not apply. But the federal tax lien is a completely different sort of entity from a state cause of action under the Minnesota Fraudulent Conveyance Act. The government could, under some circumstances, bring a fraudulent conveyance action under the egis of state law even if it did not have a tax lien. Conversely, there are clear situations in which the government could not avail itself of the fraudulent transfer statute even if it had a tax lien. The government is clearly bound by the scope of the state statute for purposes of the remedy afforded by it. For example, if Minn. Stat. § 513.29 did not allow direct seizure and sale, surely the government could not argue that it could ignore the procedural necessity of proving a void conveyance before it

seized the property. It is hard to see how this procedural limitation is any different from a statute of limitations.

Hence, a comparison between a state statute of limitations on self-help and a federal statute of limitations creating government lien rights is like comparing apples to oranges.

Thus, it is not surprising that the bulk of learned opinion has concluded that in the absence of a clear federal statute directly governing the remedy sought, federal courts should apply state statutes of limitations. As Alfred Hill noted in his article "State Procedural Law in Federal Nondiversity Litigation," 69 Harvard Law Review 66 (1955) at Page 97:

> Assuming, in such cases, that the federal court sits in the state which created the right, it is clearly desirable that the state, in the absence of an overriding federal policy, should enforce or give affect to the right in substantially the same manner as would the courts of that state, and that to the degree required to attain this end it should follow state law in the matter of statutes of limitations, statutes of frauds, presumptions, and other procedural rules which are outcome determinative

The federal court's determination also conflicts with the determination of the Supreme Court of the State of Minnesota. Minnesota's statute on limitations for actions to undo fraudulent transfers in six years. Minn. Stat. § 241.05, Subd. 1(6); *Schmidt v. Hagar*, 88 Minn. 413, 93 N.W. 110 (1903). The six year statute of limitations also applies to the rights of a purchaser against "self-help" remedies by a creditor. *See Brasie v. Minneapolis Brewing Company*, 87 Minn. 456, 92 N.W. 340 (1902).

This issue is also of extraordinary national significance. At stake is the security of titles for all landowners whose predecessors in title may have been subjected to a federal tax

lien. If the *Wurdemann* analysis is correct that the only statute of limitations barring the direct seizure and sale of property is the six year statute of limitations on the enforcement of tax liens, then no purchaser of land will be able to determine from the record whether the property being purchased is subject to being sold to satisfy the tax liabilities of a prior owner.

Since *Wilson* and *DelCostillo* indicate that state statutes of limitations govern the use of state remedies or state substantive law applied in federal courts, except in certain circumstances not here relevant, there is a direct conflict between *Wurdemann* and existing Supreme Court cases.

Finally, the substantive use of nominee liens and direct sale authority by the Internal Revenue Service without first voiding the subsequent sales directly conflicts with Minn. Stat. § 513.29 and cases of the law such as *Brasie,* which indicate that the power of creditor to reach property of a debtor without a court intervention requires the existence of a judgment. In this case, the Internal Revenue Service did not have a judgment (or its equivalent, a tax lien) against the Spaeths at the time they transferred the property to Joan M. Noske, Trustee; nor was there any tax lien in affect on the property when BBCA, Inc. owned it and sold it to Xemas, Inc.

Taken together, the questions presented are ones of enormous national significance, and the Petition for Certiorari should be granted. Rule 17 of the rules of the Supreme Court of the United States includes, among other considerations, governing the Court's discretion concerning review on certiorari:

> (b) when a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

> (c) when a state court or federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way in conflict with applicable decisions of this court.

Here, both considerations are clearly present. In such cases, where there is both a conflict among courts in an important legal question, this court has exercised its discretion and granted review by a Writ of Certiorari.

THE STATUTE OF LIMITATIONS QUESTION

In *Wurdemann*, the Eighth Circuit determined that state statutes of limitations do not govern the right of the federal government to bring an action to undo a fraudulent conveyance, even when that action was brought under the substantive law of a state. *Wurdemann* was followed by the district and circuit courts in this case. The practical affect of *Wurdemann* is to insure that no title is ever safe from a federal tax lien, no matter when a transfer of the land subject to the lien took place. Because there is no statute of limitations governing the right of the Internal Revenue Service to assess taxes against taxpayers who fail to file a return, the six year statute of limitations on limiting collections under a federal tax lien does not come into affect until a taxpayer is assessed. Hence a taxpayer failing to file on the date the first income tax law became applicable could be assessed in, e.g., 1983. And even though land owned by that taxpayer may have been transferred 10 or 12 times over the years, if the Internal Revenue Service determines that the initial transfer by the taxpayer was fraudulent, it could, in its sole discretion, use its 1983 lien against the taxpayer to sell the land now in the hands of the subsequent purchaser. Of course, if the subsequent purchaser bought the land in good faith, that purchaser may recover the consideration for the conveyance (see Minn. Stat. § 513.28(2)). But this is little consolation after he must expend large amounts of money to

go to court, to appraise the property, and recover far less than the value of the land. And of course, the possibility of such a sale clouts his title, regardless of his ultimate ability to prevail in court.

What makes the *Wurdemann* doctrine particularly devastating is its expansion of existing collection remedies. The Internal Revenue Service has explicit authority to place a jeopardy assessment upon property; and the laws and regulations are quite clear about limits on the rights of the Internal Revenue Service to use this extraordinary procedure. But if this case stands, there are no limits on the right of the Internal Revenue Service to seize the property of third parties to pay the debts of another taxpayer before the sale of property. Hence, there will be no purpose in the Internal Revenue Service using jeopardy procedures, since the one used in this case is so much more powerful. The Internal Revenue Service simply declares property to be that of the taxpayer, sells it, and waits out the short period of time during which the property owner may sue to get it back. It was not the intent of Congress to allow this vast expansion of Internal Revenue Service collection power through the extension of common law principles.

THE FEDERAL CAUSE OF ACTION QUESTION

The district court also rested its determination on the alternative holding that the transfers in question were sham transactions or alter ego transactions, using the logic of *Valley Finance, Inc. v. United States*, 629 F.2d 162 (D.C. Cir. 1980). No decision of the United States Supreme Court has ever supported the doctrine that there is a federal right to seize which is not grounded in either state statute or federal statute. If the court should determine that a Minnesota statute of limitations had run on the right of the government to seize and sell Xemas, Inc.'s property, or if it determines that there was no federal right to seize the Xemas, Inc. property under the substantive laws of the State of Minnesota, then it will be confronted with the alternative grounds half-heartedly urged by the government and the

district court. It is worth noting that in cases such as *Valley Finance,* the predication of the right to sell and seize without prior court order has always been grounded in state or federal law, such as jeopardy collection or state fraudulent conveyance laws. *See* 26 U.S.C.A. §§ 6861, 6901, 6902. Any claim that there is a direct federal right to seize predicated on a quasi-common law theory of alter ego or sham transaction has always either been secondary to these other grounds, or has been an analytical tool leading to the conclusions which ground the state or federally authorized actions. Indeed, a careful reading of the lower court's reasoning in this matter indicates that the court was probably using the doctrines of sham transaction and alter ego to analyze the issue of use of state law under fraudulent convayance statutes.

But if it was not, if the lower court, and thereby the Eighth Circuit, really was holding that there is an independent right to seize and sell property without a determination of title, the lower couurts have drastically expanded federal power. It has always been the law that remedies are granted to the Internal Revenue Service by Congress or those granted to a creditor under state law. To hold that there is an independent right to seize under a vague doctrine of "sham transaction," or "alter ego" independent of such rights is to allow a common law right of seizure. No court has ever gone this far, and the dangers of granting such a right to any federal agency are unlimited and enormous.

CONSISTENCY WITH LEGISLATIVE PURPOSE

The authority of the Internal Revenue Service to sell land or other property to satisfy a tax lien derives from 26 U.S.C.A. § 6331, which states in part:

> If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and

> rights to property (except such property as in exemption under section 6334) belonging to such person or on which there is a lien provided in this chapter for payment of such tax.

There is a specific series of statutes dealing with the transferee liability situation. 26 U.S.C.A. § 6901 provides:

> (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred:
>
> (1) Income, estate, and gift taxes.
>
> (A) Transferees. The liability, at law or in equity, of a transferee of property --
>
> (i) of a taxpayer in the case of a tax imposed by subtitle A . . .

The period of limitations for the assessment of transferee liability is extended one year in the case of the transfer. The transferee then has a right under 26 U.S.C.A. § 6902 to petition the tax court as noted. Thus, the use of the seizure proceedings here not only create a new and expansive right in the taxing authorities; they serve to deny the transferee the right to make use of those procedures to challenge Internal Revenue Service actions before they take place. It is very doubtful that Congress intended the Internal Revenue Service to have the power of immediate seizure (in the nonjeopardy situation) in addition to its powers granted under the transferee liability statutes.

As the District of Columbia Circuit Court indicated in *National Cable Television Association, Inc. v. Copyright Royalty Tribunal,* 724 F.2d 176, 181 (D.C. Cir. 1983) a federal agency, in acting against an individual, is circumscribed by the remedies provided by statute:

> In all cases, we attempt to assure ourselves that the agency has fairly attended to prescribed procedures. The tautness of court surveillance of the rationality of agency decision making, however, depends on the nature of the task assigned to the agency. If Congress sets precise guidelines for agency action, courts must tightly review the agency's directives to determine whether the congressional instructions have been observed.

Furthermore, the *Xemas, Inc.* case expands Internal Revenue Service powers to utilize state law beyond that granted to them under the laws of the State of Minnesota. Although it has been determined that the existence and extent of a transferee's liability at law or in equity is determined by the principles governing the rights of creditors as determined by applicable state law, *Commissioner v. Gene F. Stern,* 357 U.S. 39 (1958); see also *Harriet Fibel, et al. v. Commissioner,* 44 T.C. 647, 657 (1965), the extension of the statute of limitations and the extension of the right of the Internal Revenue Service to seize property upon which it had not had a judgment at the time of seizure, nor at the time of transfer grants the Internal Revenue Service a privileged position over Minnesota creditors, who would not only be bound by the six year Minnesota statute of limitations from the date of transfer, but would also be bound to seek an affirmative avoidance of the title under Minn. Stat. § 513.29 for property which was not under judgment at the time of transfer. For Minn. Stat. § 513.29 states:

> Where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured he may proceed in a court of competent jurisdiction against any person against whom he could have proceeded had his claim matured, and the court may:
>
> (1) Restrain the defendant from disposing of his property;
>
> (2) Appoint a receiver to take charge of the property;
>
> (3) Set aside the conveyance or annul the obligation; or
>
> (4) Make any order which the circumstances of the case may require.

Requires that a creditor who does not have a judgment must seek an avoidance action and may not sell or dispose of the property before prevailing therein. Federal statutes are wholly inadequate to compensate a property holder for a wrongful seizure under 26 U.S.C.A. § 7426(a). If the government is allowed to utilize procedures which it has utilized in this case, the inadequacy is multiplied. By granting an additional, nonstatutory power to sell a record owner's property and force that record owner to proceed under § 7426(a) without being compensated for attorney's fees, lost opportunity costs, and so forth, the government will be given a blank check on its entire citizenry.

CONCLUSION

The conflict between this case (and its Eighth Circuit predecessor, *United States v. Wurdemann*) and more liberal rulings of the Supreme Court is clear. The expansion of government powers, together with the unlimited time within which the government may seize and sell land without court process presents a threat to the entire title system in Minnesota. Finally, the action taken here uses

state law in a manner which conflicts with the opinions of the highest Minnesota courts, and state statutory law. The Petition for Certiorari should be granted.

Dated: December 18, 1989.

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APPENDIX A

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT

No. 88-5284

Xemas, Inc.,
Appellant,

v.

United States of America,
Appellee.

OPINION

Appeal from the United States District Court
for the District of Minnesota

Submitted May 12, 1989.

Decided July 24, 1989.

Before ARNOLD, BRIGHT, and FAGG,
Circuit Judges

Xemas, Inc. for appellant.

United States of America for Appellee.

John Mack, Atty., New London, Mn Attorney for appellant.

Thomas D. Sykes, U.S. Department of Justice, Washington D.C., Attorney for Appellee.

PER CURIAM.

Xemas, Inc. brought this wrongful-levy action after a house and lot allegedly owned by the company were seized by the IRS to satisfy the tax liabilities of Roman and Imelda Spaeth. After a four-day bench trial, the District Court ruled in favor of the United States, dismissing Xemas's complaint. Now Xemas appeals, arguing that the Court erred in finding that the series of conveyances by which the house and lot wound up deeded to Xemas were sham transactions to defraud the IRS, and that the Court erred in holding the levy was not barred by the statute of limitations. After considering the appellant's arguments, we affirm for the reasons given in the opinion of the able District Judge. See 8th Cir. R. 14.[2]

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[1]The Hon. Edward J. Devitt, Senior United States District Judge for the District of Minnesota.

[2]The motion of appellant for leave to file a supplemental affidavit is granted.

APPENDIX B

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT

No. 88-5284

Xemas, Inc.,
Appellant,

v.

United States of America,
Appellee.

ORDER

On Appeal from the United States District Court
for the District of Minnesota

Filed September 20, 1989

Before ARNOLD, BRIGHT, and FAGG,
Circuit Judges

Appellant's petition for rehearing has been considered by the Court and is denied.

APPENDIX C

UNITED STATES DISTRICT COURT,
EIGHTH CIRCUIT

No. 6-86-1077

Xemas, Inc.,
Plaintiff,

v.

United States of America,

Defendant.

MEMORANDUM, FINDINGS, AND ORDER

Filed March 24, 1988.

Before DEVITT
Circuit Judge

Xemas, Inc., for the plaintiff.

United States of America, for the defendant.

John Mack, New London, Minnesota, Attorney for plaintiff.

Thomas D. Sykes, U.S. Department of Justice, Washington D.C., attorney for defendant.

DEVITT, United States District Judge:

In this action brought under 26 U.S.C. § 7426, plaintiff claims the Untied States wrongfully levied and foreclosed on certain Stearns County Minnesota property, title to which was then recorded in its name, and seeks return of the property. Defendant denies the claim and asserts it properly foreclosed its federal tax lien on the property pursuant to 26 U.S.C. § 6331 et seq. in satisfaction of delinquent federal taxes due from Roman and Imelda Spaeth who were the actual owners of the property within the meaning of § 6331(a).

The issue is whether the attempted serial transfer of title to the property from the Spaeths to "Joan Noske, as trustee of Chapter 7024 of Basic Bible Church of America", and later to "BBCA, Inc." and later to "Xemas, Inc.", the plaintiff, was a sham, lacking economic reality, and an attempt to defraud the United States as a creditor.

Trial was held March 14, 15, 16 and 18, 1988. Sixteen witnesses testified. All exhibits listed on the parties exhibit lists were received. Briefs and proposed Findings of Fact and Conclusions of Law have been lodged.

The Court is fully satisfied that the Government's seizure of the property was not wrongful and that the series of attempted transfers of title was a sham, devoid of economic substance and a contrived device to defraud the United States of its claim upon the property of the taxpayers. This conclusion is supported by detailed findings later to be stated.

The facts which unfold from the witnesses, 150 exhibits and the files of the U.S. District Court for the District of Minnesota of which we take judicial notice, are of an attempt by a group of tax protester residents of Stearns

County Minnesota to frustrate the Government in its attempt to satisfy its lien on a delinquent taxpayer's real property in Richmond, Minnesota. This was sought to be achieved by the taxpayers, Roman and Imelda Spaeth, aided and directed by fellow protestors Joan and James Noske and others, by creating dummy entities basically operated by underlings whom they controlled and by passing title to the Spaeth property on to those entities. Xemas, Inc., plaintiff herein, acquired title to the property on November 28, 1984.

The evidence shows that the principal participants in executing the scheme were Imelda Spaeth and Joan and James Noske. Imelda Spaeth is a housewife. (Roman Spaeth, husband of Imelda, was just painted on the scene. He testified he didn't really understand what was going on. In essence, he said he did what his wife told him to do.) Joan and James Noske, sister and brother, are college educated and have long engaged in real estate and tax work. The evidence showed that neither one has filed an income tax return since 1977. Joan Noske received a B.S. degree in business administration from St. Cloud State University in 1976 and has long practiced her accounting profession. She said she passed her CPA examinations and very shortly will receive her license in the mail.

Her brother, James Noske, has been a licensed real estate broker since 1972 and holds an MBA degree from St. Cloud State University. He said he is a third year law student at William Mitchell college of Law, St. Paul He held the title of "Reverend" in Basic Bible Church of America, Chapter 7024. James Noske drafted the purported conveyance from the Spaeths to that entity in 1978.

The Noskes, Joan and James, both testified. They denied participation in any wrongdoing of any kind. Each was generally evasive in giving answers to key questions as to their apparent participation in the scheme. A strong showing of their involvement, however, came from other, highly credibly evidence.

A precis of the testimony of two witnesses, Daniel Strohmeier and Mary Heid, is significant in punctuating the deception orchestrated by Imelda Spaeth and the Noskes.

Strohmeier was a handyman for the Noskes for about 12 years. He did painting and ran errands. He had a limited education. He said he had a drinking problem for years and was in treatment centers for chemical dependency about 10 times. He said he had 2 oz. of blackberry brandy before 7:00 a.m. the morning he testified. He was competent.

Strohmeier testified the Noskes put him on as President of Xemas, Inc., when it was formed in October, 1984 and that he held that title till August, 1987, when he got fed up and quit. The Noskes also put his girlfriend, Mary Heid, on as Vice President of Xemas, Inc. Strohmeier testified he did not actually run the affairs of Xemas, Inc. but only signed documents ("hundreds of them") when told to do so by the Noskes. He said he never attended any Xemas meetings and paid nothing for stock in the company. He said it was "all Greek to him" and that he "didn't know what was going on".

Similar testimony was offered by Mary Heid, live-in girlfriend of Strohmeier. The Noskes put her on as Vice-President and Financial Officer of Xemas, Inc. She paid nothing for stock and really didn't know what Xemas "was all about." She signed her name hundreds of times whenever Danny Strohmeier or the Noskes told her to do so.

The testimony of Strohmeier and Heid was very credible. It was convincing that Xemas, Inc. was just a dummy corporation controlled and directed by the Noskes and Imelda Spaeth for an improper tax avoidance purpose.

In response to the direction of Civil Rule 52, the court makes these additional, and more specific, findings:

1. The property at issue is a parcel of real estate, on which sits a single-family, three bedroom, ranch-style home located in Richmond, Minnesota, legally described as:

> The South Seventy-two (72) feet of Lots Four (4), Five (5), and Six (6), Block Three (3) of Ahmann's Addition to the Village of Richmond, according to the plat and survey thereof on file and of record in the office of the County Recorder in and for Stearns County, Minnesota.

The property was seized by the Internal Revenue Service on July 9,. 1986, pursuant to a Notice of Seizure (Form 2433) served on that date.

2. Plaintiff Xemas, Inc. is a Minnesota corporation formed October 24, 1984. At the time of the Service's seizure of the property, Xemas held record title to the property under a purported warranty deed dated November 28, 1984.

3. Roman and Imelda Spaeth are husband and wife, residing in Richmond, Minnesota. They held title to the property involved from the 1962 until December 28, 1978, when they executed a warranty deed conveying the property to Joan Noske as Trustee of Chapter 7024 of the Basic Bible Church of America, an unincorporated association. The deed was recorded with the Stearns County Recorder's Office on January 26, 1979.

4. James and Joan Noske are brother and sister. They have resided at all pertinent times in Richmond, Minnesota, with their mother, Esther Noske.

5. Joan Noske as Trustee of Chapter 7024 of the Basic Bible Church of America (hereinafter "Chapter 7024") conveyed the property to BBCA, Inc. by a quitclaim deed dated December 30, 1980. It was recorded January 27, 1981. BBCA, Inc. is a Minnesota corporation organized on or about November 20, 1980.

6. BBCA. Inc. conveyed title to the property to Xemas, Inc. by a warranty deed dated November 28, 1984.

7. On July 14, 1980, the U.S. Government, through the Internal Revenue Service, assessed $3,380.39 in federal income taxes against Roman and Imelda Spaeth for 1977; a notice of lien reflecting this assessment was filed with the Stearns County Recorder on August 31, 1981, reflecting that they owed that amount, plus interest. On September 18, 1984, the Internal Revenue Service caused to be filed with the Stearns County Recorder another notice of lien asserting that all property and rights to property belonging to BBCA, Inc. as the nominee of Roman and Imelda Spaeth were subject to that tax lien.

8. On February 27, 1985, the Service made assessments totaling $16,560.60 against Roman Spaeth for federal income taxes for the years 1978-82. A notice of lien reflecting those assessments was filed with the Stearns County Recorder on May 8, 1985. On July 25, 1985, another notice of lien was filed with the Recorder, asserting that all property and rights to property belonging to BBCA, Inc. as the nominee of Roman Spaeth were subject to that tax lien.

9. On February 11, 1986, the Service made assessments against Imelda Spaeth for federal income taxes for the years 1978-81; the assessments totalled $29,788.69. A notice of lien reflecting the assessments was filed with the Recorder on July 9, 1986. Another notice of lien was filed with the Recorder on that same date, asserting that property and rights to property belonging to BBCA, Inc. as the nominee of Imelda Spaeth were subject to that tax lien.

10. As early as December, 1977, the Spaeths began engaging in activities intended to prevent the collection of federal income taxes that were and would be properly due from them. These activities included special arrangements by Mrs. Spaeth with the veterinary clinic where she worked as a bookkeeper. At first these arrangements provided that

her paychecks during the years 1978 through 1980 were to be paid to Chapter 7991 of the Basic Bible Church of America. Later arrangements provided that her paychecks for 1981 through the present were to be paid to BBCA, Inc. These arrangements also permitted Mrs. Spaeth to avoid having taxes withheld from paychecks.

11. Mission, Inc. is a South Dakota corporation formed in August, 1981. Its primary activity was to provide a cover for a bank account that Joan and James Noske used to facilitate transactions related to their business ventures which included promoting illegal, abusive tax shelters through the operation of two corporations they controlled, Armageddon, Inc. and Parnell, Inc.

12. Since the early 1960's, the Spaeths have continuously resided at the property in question. Even after conveying the property to Ms. Noske as Trustee of Chapter 7024, they have continued to have compete beneficial use and enjoyment of that property and without the payment of rent.

13. The affairs of Chapter 7024, BBCA, Inc., Xemas, Inc., and Mission, Inc. were controlled and directed by James and Joan Noske to aid and assist the Spaeths in their effort to prevent the United States from collecting income taxes that were, and would become, due. There was an understanding between James and Joan Noske and the Spaeths that the Spaeths would continue to have beneficial use and enjoyment of this property notwithstanding the three conveyances at issue. These conveyances appeared to be a part of a larger scheme orchestrated by Joan and James Noske for the purpose of hindering and delaying efforts by the United States to collect taxes owed to it by various people.

14. The testimony of James Noske, Joan Noske, and Imelda Spaeth was not worthy of belief in any important respect. The testimony of James and Joan Noske reflected a

purpose to conceal the truth. Each was often unresponsive and evasive. Their testimony and demeanor did not reflect verity.

15. The purported conveyance from the Spaeth's to Joan Noske, trustee, reflected in the deed dated December 28, 1978, was made with an intent on the part of the Spaeths and Joan and Jim Noske to prevent the United States from collecting taxes the Spaeths did and would owe. The conveyance had no economic reality. It was made without fair consideration or reasonably equivalent value, and it left the Spaeths without assets having a value sufficient to pay the debts they owed to the United States. Moreover, it left them without sufficient assets to pay the additional debts they could reasonably be expected to owe to the United States in the future.

16. The purported conveyance from Joan Noske, trustee to BBCA, Inc., reflected in the deed dated December 30, 1980, was made with an intent on the part of the Spaeths and Joan and Jim Noske to prevent the United States from collecting the taxes the Spaeths did and would owe. The conveyance had no economic reality. It lacked fair consideration or reasonably equivalent value, and was made at a time when the Spaeths were without assets having a value sufficient to pay the debts they owed to the United States. Moreover, it left them without sufficient assets to pay the additional debt they could reasonably be expected to owe to the United States (sic) in the future.

17. The purported conveyance from BBCA, Inc. to Xemas, Inc. dated November 28, 1984, was made with an intent on the part of Joan and Jim Noske and the Spaeths to prevent the United States from collecting taxes that were or would be due from the Spaeths. It had no economic reality. It was made without fair consideration or reasonably equivalent value, and the Spaeths were at the time without assets having a value sufficient to pay the debts then owed to the United States.

18. Xemas, Inc. was sent a notice of the seizure by the Internal Revenue Service. Mary Heid (Xemas' ostensible Vice- President) received it on July 11, 1986, within two days of the seizure.

CONCLUSIONS OF LAW

A. In a wrongful levy action under 26 U.S.C. § 7426, there is an initial burden on the plaintiff to prove it has an interest in the property and that the government levied on the property because of tax assessments against another person, a taxpayer. The burden then shifts to the government to prove the nexus between the property and the taxpayer by substantial evidence. The plaintiff has the ultimate burden of proving that the levy was wrongful and should be overturned. *Morris v. United States,* 813 F.2d 343, 345 (11th Cir. 1987); *Valley Finance, Inc. v. United States,* 629 F.2d 162, 171 n. 19 (D.C. Cir. 1980), *cert. denied sub nom. Pacific Development Inc. v. United States,* 451 U.S. 1018 (1981); *Arth v. United States,* 735 F.2d 1190, 1193 (9th Cir. 1984).

The plaintiff met its initial burden by introducing documents evidencing the series of conveyances which ultimately vested title to the Spaeths' property in Xemas, Inc. Consequently, the burden shifted to the government to prove, by substantial evidence, a nexus between the property and the Spaeths. The government established the nexus by proving that the series of conveyances which ultimately vested title in Xemas, Inc. were all voidable under Minnesota's uniform fraudulent conveyance act.

B. Minnesota's uniform fraudulent conveyance act, Minn. Stat. §§ 513.20-.32, in effect during the years in question, provided that a conveyance made with actual intent to hinder, delay, or defraud creditors is voidable (§ 513.26) and that, even if an actual intent to hinder, delay, or

defraud is not present, a conveyance is voidable if it rendered the transferor insolvent and was made without fair consideration (§ 513.23). Under these principles, a conveyance made with a secret understanding that the transferor shall have the benefit of the property in question is fraudulent as to subsequent creditors. *Johnson v. Union Inv. Co.*, 149 Minn. 106, 108, 182 N.W. 955, 956 (1921). These statutes are designed to prevent debtors from putting property available for the payment of debts beyond the reach of their creditors. *Kummet v. Thielen*, 210 Minn. 302, 306, 298 N.W. 245, 247 (1941). The statutes are remedial and should be literally construed. *Lind v. O.N. Johnson Co.*, 204 Minn. 30, 40, 282 N.W. 661, 667 (1938).

Under Minnesota law, if a creditor demonstrates sufficient badges of fraud, the burden of production shifts to the party contending that a fraudulent conveyance has not occurred. *Argonaut Insurance Co. v. Cooper*, 395 N.W.2d 119, 122 (Minn. App. 1986). In the present case, the United States presented sufficient evidence to meet its initial burden of production. The evidence received revealed badges of fraud, including multiple gross irregularities in the operations of the entities involved and in the transactions at issue, all accompanied by vigorous efforts by key witnesses to conceal the truth. The burden of production shifted to plaintiff and plaintiff failed to come forth with credible evidence rebutting the inference that the conveyances at issue were fraudulent.

The government was a present creditor of Spaeths for purposes of Minnesota's uniform fraudulent conveyance act when Spaeths conveyed their property to Joan Noske, trustee. The government became a creditor when the taxes arose, *Lind v. O.N. Johnson Co.*, 204 Minn. at 39, which, for tax year 1977, was April 15, 1978. *United States v. Wurdemann*, 663 F.2d 50, 51 (8th Cir. 1981). The Spaeths owned the property at that time and did not convey it to Joan Noske, trustee, until December 1978.

The three conveyances at issue were fraudulent as to the United States because they were made with an intent on the part of Roman and Imelda Spaeth and James and Joan Noske, acting through their entities which were essentially their alter egos, to hinder, delay, and defraud the United States, a creditor of the Spaeths. Minn. Stat. § 513.26. The conveyances were also fraudulent as to the United States because they were made without fair consideration and rendered or kept the Spaeths insolvent. Minn. Stat. § 513.23. Plaintiff Xemas, Inc., as alter ego of the Spaeths and James and Joan Noske, was not a "purchaser for fair consideration without knowledge of the fraud at the time of the purchase" within the meaning of Minnesota Stat. § 513.28(1).

The fraudulent conveyances were voidable by the United States and could have been set aside or completely disregarded. Minn. Stat. § 513.28. The property in question belonged to the Spaeths within the meaning of 26 U.S.C. § 6331(a) at the time of the seizure and the government was authorized by that section to levy upon the property without first adjudicating the Spaeths ownership by an action under § 513.28(1)(a) of Minnesota's uniform fraudulent conveyances act. The government's levy is supported by F.P.P. *Enter. v. United States*, 87-2 U.S.T.C. Par. 9536 at 89,557 (8th Cir. 1987) and *DiEdwardo v. First Nat'l Bank*, 442 F. Supp. 499, 500 (E.D. Penn. 1977) and is consistent with the policy evidenced by Minn. Stat. 513.28(1)(b). The government was not barred by Minnesota's statute of limitations from raising the issue of fraudulent conveyance defensively in this action in order to enforce valid tax debts. *United States v. Wurdemann*, 663 F.2d at 51.

C. Xemas, Inc. failed to meet its ultimate burden of proving that the levy was wrongful in view of the government's proof, on the theory of fraudulent conveyance, that there was a strong nexis between the Spaeths and the property.

D. The government's levy and sale of the property did not violate Xemas, Inc.'s due process rights. Xemas was not entitled to receive a notice of deficiency regarding the Spaeths' tax liability. 26 U.S.C. § 6212; *Valley Finance, v. United States,* 629 F.2d 162, 169 (D.C. Cir. 1980). Xemas received appropriate notice of the seizure and sale. 26 U.S.C. § 6335. Since Xemas had post-seizure remedies available under 26 U.S.C. § 7426, it was not entitled to pre-seizure judicial review. *Hudson v. Palmer,* 468 U.S. 517 (1984).

ORDER

The complaint is **DISMISSED.**

APPENDIX D

Minnesota Statutes
§ 513.28 and § 513.29

513.28 RIGHTS OF CREDITORS WHOSE CLAIMS HAVE MATURED.

(1) Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when the claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser:

(a) Have the conveyance set aside or obligation annulled to the extent necessary to satisfy the claim, or

(b) Disregard the conveyance and attach or levy execution upon the property conveyed.

(2) A purchaser who without actual fraudulent intent has given less than a fair consideration for the conveyance or obligation, may retain the property or obligation as security for repayment.

513.29 RIGHTS OF CREDITOR WHOSE CLAIMS HAVE NOT MATURED.

Where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured, the creditor may proceed in a court of competent jurisdiction against any person against whom the creditor could have proceeded had the claim matured, and the court may:

(1) Restrain the defendant from disposing of the property;

(2) Appoint a receiver to take charge of the property;

(3) Set aside the conveyance or annul the obligation; or

(4) Make any order which the circumstances of the case may require.

Supreme Court, U.S.
FILED
FEB 23 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1037

In the Supreme Court of the United States

OCTOBER TERM, 1989

XEMAS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the IRS's levy in this case was wrongful because the seizure occurred more than six years after the taxpayers made a fraudulent conveyance of the property and Minnesota law establishes a six-year statute of limitations for commencing a suit to set aside a fraudulent conveyance.

2. Whether the IRS was required to seize the property in this case by some means other than an administrative levy.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unpublished, but the decision is noted at 889 F.2d 1091 (Table). The opinion of the district court (Pet. App. 6a-18a) is reported at 689 F. Supp. 917.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1989. A petition for rehearing was denied on September 20, 1989 (Pet. App. 4a-5a). The petition for a writ of certiorari was filed on December 19, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Roman and Imelda Spaeth, who are husband and wife, have engaged in various activities designed to prevent the collection of their federal income taxes since December 1977 when they became "ministers" in the Basic Bible Church of America (Pet. App. 11a, 12a). By a warranty deed dated December 28, 1978, the Spaeths transferred title in their residence to Joan Noske as trustee of Chapter 7024 of the Basic Bible Church of America (*id.* at 11a, 14a). The Spaeths continued to reside in the property following this transfer, without the payment of rent (*id.* at 13a). On July 14, 1980, the IRS made an income tax assessment against the Spaeths for tax year 1977 in the amount of $3,380 (*id.* at 12a). A notice of federal tax lien reflecting that assessment was filed with the Stearns County Recorder on August 31, 1981 (*ibid.*).

On or about November 20, 1980, a Minnesota corporation called BBCA, Inc. (BBCA) was formed (Pet. App. 11a).[1] On December 30, 1980, Joan Noske, as trustee of Chapter 7024 of the Basic Bible Church of America, quitclaimed the Spaeth residence to BBCA (*ibid.*). On September 18, 1984, the IRS filed a notice of tax lien relating to the assessment against the Spaeths for tax year 1977, asserting that BBCA was a nominee of the Spaeths (*id.* at 12a). Five weeks later, on October 24, 1989, petitioner Xemas, Inc., a Minnesota corporation, was formed (*id.* at 11a). On November 28, 1984, title to the Spaeth residence

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[1] During the years 1978-1980, the veterinary clinic that employed Imelda Spaeth as a bookkeeper sent her paychecks to Chapter 7991 of the Basic Bible Church of America, and no taxes were withheld from her wages based on her claimed exemption from withholding as a "minister." Beginning in 1981, her employer paid Imelda Spaeth's salary directly to BBCA. Under this arrangement, her employer treated her as an independent contractor from whom taxes should not be withheld. Pet. App. 12a-13a.

was transferred to petitioner (*id.* at 12a). During this entire period, the Spaeths continued to reside in the premises without paying rent (*id.* at 13a).

On February 27, 1985, the IRS made income tax assessments totalling $16,561 against Roman Spaeth for his delinquent 1978-1982 taxes. On February 11, 1986, the IRS made income tax assessments totalling $29,789 against Imelda Spaeth for the taxable years 1978-1981. Notices of federal tax lien were filed with the Stearns County Recorder for those assessments on May 8, 1985, and July 9, 1986. Notices were also filed on July 25, 1985, and on July 9, 1986, asserting that the property belonging to BBCA as the nominee of Roman and Imelda Spaeth was subject to the tax liens for those tax years. Pet. App. 12a.

On July 9, 1986, pursuant to a notice of seizure served that same day, the IRS seized the Spaeth residence by administrative levy to satisfy the Spaeths' assessed 1977-1982 income tax liabilities (Pet. App. 11a). Petitioner received the notice of seizure on July 11, 1986 (*id.* at 15a).

2. Prior to the sale of the seized property, petitioner brought this suit in the United States District Court for the District of Minnesota alleging a claim for wrongful levy under Section 7426 of the Internal Revenue Code.[2] In its original complaint, petitioner sought only to enjoin the sale of the property. Thereafter, on January 7, 1987, the public sale of the property was held as scheduled (Tr. 512). Petitioner subsequently was permitted to amend its complaint to seek as relief the property's value or return (Doc. 26). The government denied that it had wrongfully levied on the property, asserting that it was entitled to foreclose its federal tax lien on the property in satisfaction of taxes due from the Spaeths because they were the true owners of the

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[2] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

property within the meaning of Section 6331(a) of the Code. Pet. App. 8a.

After a four-day bench trial, the district court dismissed the suit (Pet. App. 6a-18a). The court explained that it was "fully satisfied" that the government's seizure of the property was "not wrongful" and that "the series of attempted transfers of title was a sham, devoid of economic substance and a contrived device to defraud the United States of its claim upon the property of the [Spaeths]" (*id.* at 8a). This conclusion rested upon several findings of fact. The court determined that the affairs of petitioner, Chapter 7024 of the Basic Bible Church, and BBCA, Inc. were all controlled and directed by James and Joan Noske to aid and assist the Spaeths in their effort to prevent the United States from collecting income taxes that were and would become due (*id.* at 10a, 13a). The Noskes and the Spaeths sought to achieve this tax avoidance by creating dummy entities, which they controlled, and then transferring title to the Spaeth residence to those entities (*id.* at 9a-10a).

The court then made specific findings with respect to the conveyances at issue. It found that each of the conveyances was made "with an intent on the part of the Spaeths and Joan and Jim Noske to prevent the United States from collecting taxes the Spaeths did and would owe" (Pet. App. 14a). The court also found that each conveyance "had no economic reality * * * [and] was made without fair consideration or reasonably equivalent value" (*ibid.*). The court also found that the conveyances were made at a time when the Spaeths were without assets having a sufficient value to pay the debts they owed the United States and the debts they could reasonably be expected to owe the United States in the future (*ibid.*). And the court determined that there was an understanding between James and Joan Noske and the Spaeths that the Spaeths would continue to have

beneficial use and enjoyment of this property notwithstanding the three conveyances at issue (*id.* at 13a).

Based on these findings, the court determined that the series of conveyances that ultimately vested title in petitioner were all voidable under Minnesota's Uniform Fraudulent Conveyance Act, Minn. Stat. Ann. §§ 513.20 *et seq.* (West 1947),[3] and that this determination established a nexus between the property and the Spaeths sufficient to justify enforcement of the lien to satisfy the Spaeths' tax liability (Pet. App. 15a). The court found that the government was a present creditor of the Spaeths when they conveyed the property to Joan Noske (*id.* at 16a), that the conveyance left the Spaeths without sufficient assets to pay the tax debt they could reasonably be expected to owe in the future (*id.* at 14a), that none of the conveyances was made for consideration (*id.* at 17a), and that each conveyance either rendered or kept the Spaeths insolvent (*ibid.*). The court also concluded that petitioner was an alter ego of the Spaeths and, accordingly, that petitioner was not a "purchaser for fair consideration without knowledge of the fraud at the time of the purchase" within the meaning of the Minnesota statute (*ibid.*).

The district court also rejected petitioner's procedural claims. The court held that the IRS was not required to wait until it had adjudicated a fraudulent conveyance claim and received a judgment against the Spaeths before it could levy upon the property (Pet. App. 17a). The court also held that Minnesota's statute of limitations on bringing a suit alleging a fraudulent conveyance did not bar the government from raising the question of fraudulent conveyance defensively in the wrongful levy action (*ibid.*). And the court

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[3] This statute was repealed in 1987 and replaced with a new uniform fraudulent conveyance statute, Minn. Stat. Ann. §§ 513.41-513.51 (West Supp. 1990). See 1987 Minn. Laws ch. 19.

rejected petitioner's claim that it was denied a right to pre-seizure judicial review, explaining that the IRS was not required to issue a notice of deficiency to petitioner concerning the Spaeths' tax liability. Finally, the district court held that the levy did not violate due process because petitioner was given notice of the seizure and had an adequate post-seizure remedy available in the wrongful levy suit (*id.* at 18a).

The court of appeals affirmed "for the reasons given in the opinion of the able District Judge" (Pet. App. 1a-3a).

ARGUMENT

The courts below correctly rejected petitioner's contention that the levy in this case was wrongful. Petitioner does not allege that the decision below conflicts with a decision of another court of appeals, and it is fully consistent with the decisions of this Court. Accordingly, there is no reason for further review.

1. Petitioner's primary contention (Pet. 4-8) is that the government's levy was barred by Minnesota's six-year statute of limitations on setting aside fraudulent conveyances (see Minn. Stat. Ann. § 541.05, subd. 1(6) (West 1988)) because the Spaeths' original conveyance of the property to Joan Noske, as trustee, occurred more than six years before the seizure.[4] This contention is without merit.

The government's levy was executed under authority conferred by Congress in the Internal Revenue Code. It is well recognized that the United States is not bound by state

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[4] The Minnesota statute of limitations begins to run not from the conveyance itself, but rather from the time the creditor "discover[s] • • • the facts constituting the fraud." Minn. Stat. Ann. § 541.05, subd. 1(6) (West 1988). Thus, even if, contrary to our submission, the statute of limitations were applicable here, it is not apparent that the six-year period had expired.

statutes of limitations or subject to the defense of laches in enforcing federal rights. See, *e.g.*, *United States* v. *Summerlin*, 310 U.S. 414, 416 (1940); *United States* v. *Wurdemann*, 663 F.2d 50, 51 (8th Cir. 1981); *United States* v. *Fernon*, 640 F.2d 609, 612 (5th Cir. 1981). The duration of the government's authority to levy on property is instead determined by the specific federal statute of limitations that Congress has established. Section 6321 of the Code provides for the imposition of a tax lien in favor of the United States "upon all property and rights to property" belonging to a delinquent taxpayer. Section 6322 of the Code generally provides that the tax lien arises in favor of the United States upon assessment and continues until the liability is satisfied or the lien becomes unenforceable by reason of lapse of time. Section 6331 of the Code authorizes collection of a taxpayer's delinquent tax "by levy upon all property and rights to property * * * belonging to such person or on which there is a lien * * *." Section 6502 of the Code prescribes the relevant time limitation—authorizing the government to collect a tax debt by levy if the levy is begun (*i.e.*, if the notice of seizure is given) within six years of assessment. The levy in this case was timely under this framework established by Congress (because all assessments against the Spaeths were made less than six years before the notice of seizure was given on July 9, 1986), and therefore the courts below properly found that the levy was not wrongful. See also *United States* v. *Fernon*, 640 F.2d at 611-612 & n.7.[5]

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[5] Petitioner's contention (Pet. 6) that the decision below conflicts with this Court's decisions in *Wilson* v. *Garcia*, 471 U.S. 261 (1985), and *DelCostello* v. *Teamsters*, 462 U.S. 151 (1983), is misconceived. Those decisions, which involved suits brought by private parties, merely stated the "settled practice" that a state statute of limitations may be adopted as federal law "[w]hen Congress has not established a time limitation for a federal cause of action." *Wilson*, 471 U.S. at 266; see also

Moreover, the decision below stands independent of the Minnesota fraudulent conveyance statute. Although a taxpayer may seek to reduce his taxes by any lawful means, it is well settled that a transaction will not be given effect if that form does not coincide with economic reality and is, in effect, a sham. See, *e.g.*, *Knetsch* v. *United States*, 364 U.S. 361 (1960); *Gregory* v. *Helvering*, 293 U.S. 465 (1935). As this Court stated in *Commissioner* v. *Court Holding Co.*, 324 U.S. 331, 334 (1945):

> The incidence of taxation depends upon the substance of a transaction. * * * To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress.

With respect to tax matters, "transactions, which do not vary control or change the flow of economic benefits, are to be dismissed from consideration." *Higgins* v. *Smith*, 308 U.S. 473, 476 (1940). Hence, this Court has recognized that if the title holder of property is the alter ego of the taxpayer, the IRS can "properly regard [the title holder's] assets as [the taxpayer's] property subject to the lien under § 6321, and the Service would be empowered, under § 6331, to levy upon assets held in [the title holder's] name in satisfaction of [the taxpayer's] income tax liability." *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 351 (1977) (citing *Griffiths* v. *Commissioner*, 308 U.S. 355 (1939)).

Based on evidence adduced at trial, the district court correctly concluded (Pet. App. 8a) that "the series of attempted transfers of title was a sham, devoid of economic substance

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DelCostello, 462 U.S. at 158. Here, the federal government is enforcing a federal right for which Congress *has* established a statute of limitations, and there is no justification for limiting that right by reference to a state law rule.

and a contrived device to defraud the United States of its claim upon the property of the taxpayers." Since those transactions were shams, the property levied upon belonged to the Spaeths for federal tax purposes, and the government was entitled to levy upon it to satisfy their tax liabilities, without regard to the state's fraudulent conveyance statute.[6]

2. Petitioner also contends (Pet. 8-12) that, regardless of the true ownership of the property, the government lacked authority to seize the property without a judicial order or, alternatively, unless it proceeded under either the Minnesota fraudulent conveyance statute, the Code's jeopardy assessment procedure (I.R.C. § 6861), or its transferee liability provisions (I.R.C. §§ 6901-6902).

The Code provides the IRS with authority to levy on property of the delinquent taxpayer. I.R.C. § 6331(a). Although this procedure involves a seizure without a judicial order, this Court has recognized that the interests of third parties are sufficiently protected through the post-seizure wrongful levy proceeding. See *United States* v. *National Bank of Commerce*, 472 U.S. 713, 729 (1985). Here, the court determined in that proceeding that petitioner, who held the

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[6] There is no justification for petitioner's assertion that this decision has "extraordinary national significance" (Pet. 5) because it will cause uncertainty in the real estate market. Both Minnesota and federal law protect a good faith purchaser for value without notice. See Minn. Stat. Ann. § 513.48(a) (West Supp. 1990); I.R.C. § 6323(a). The decision in this case rested in part on the district court's conclusion (Pet. App. 17a) that petitioner did not qualify for this protection. That conclusion was supported by several of the court's findings, which are not challenged here: the conveyance to petitioner was without fair consideration or reasonably equivalent value (*id.* at 14a); it was made with the intent on the part of the Spaeths and the Noskes to prevent the United States from collecting the Spaeths' taxes (*ibid.*); petitioner was merely the alter ego of the Noskes and the Spaeths (*id.* at 17a); and notices of tax lien, identifying all property of BBCA as subject to the Spaeths' tax lien, had been filed before the conveyance to petitioner (*id.* at 12a).

title, was merely an alter ego of the Spaeths because they, along with the Noskes, completely controlled petitioner. Moreover, the court also determined that the conveyances of the property from the Spaeths to other parties were shams. Accordingly, the Spaeths had an interest in their residence that permitted the government to levy upon that property. See *G.M. Leasing Corp.* v. *United States*, *supra*.

Petitioner's contention that the government was required to proceed by some different method misapprehends the function of the administrative levy. It is a provisional remedy that does not finally determine the relative rights or interests of any competing claimants to the property seized. See *United States* v. *National Bank of Commerce*, 472 U.S. at 728. The administrative levy allows the government to obtain immediate possession of property (including property that on its face belongs to a third party) in which a taxpayer is believed to have an interest—to protect the government against loss while competing claims are resolved in the post-seizure proceedings afforded by the Code. *Id.* at 728-731. Congress has expressly provided that a third party who claims an interest in the seized property may challenge the seizure through either administrative review (I.R.C. § 6343) or judicial review (I.R.C. § 7426). See 472 U.S. at 731. The administrative levy procedure adequately protects the interests of third parties, and the government is entitled to invoke it where the prerequisites of Section 6331(a) are satisfied, notwithstanding the existence of other possible methods of proceeding. See also *Culligan Water Conditioning* v. *United States*, 567 F.2d 867, 870 (9th Cir. 1978) (transferee liability provision of I.R.C. § 6901 is not mandatory where applicable; it is merely one of the IRS's collection methods).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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